



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2014-0191; FRL-9908-27-Region6]

Approval and Promulgation of Implementation Plans; Texas; Revisions to the Minor New Source Review (NSR) State Implementation Plan (SIP); Types of Standard Permits, State Pollution Control Project Standard Permit and Control Methods for the Permitting of Grandfathered and Electing Electric Generating Facilities

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving several revisions to the Texas State Implementation Plan (SIP) related to the Texas Minor New Source Review (NSR) Standard Permits (SP) Program. First, EPA is approving revisions submitted by the Texas Commission on Environmental Quality (TCEQ, or Commission) on January 3, 2000, and March 11, 2011, expanding the Texas SP Program to include the Rule Standard Permit (Rule SP). The EPA is also approving a revision to the Texas SIP submitted by the TCEQ on February 1, 2006, for a specific Rule SP, the Rule Standard Permit for Pollution Control Projects (Rule SP for PCP) as meeting the requirements for a Minor NSR SIP revision. Finally, because EPA is approving the Rule SP for PCP, EPA is also approving a severable portion of the January 3, 2000, submittal concerning the Texas Senate Bill 7 (SB7) permitting program for grandfathered and electing electric generating facilities (EGFs). All of the Texas SB7 EGFs permitting program

provisions have been approved as part of the Texas NSR SIP except for this severable portion. This severable portion allowing for the use of the Rule SP for PCP for permitting of collateral emission increases is being approved as meeting the requirements for a Minor NSR SIP revision. EPA is approving these actions under section 110 of the Federal Clean Air Act (the Act or CAA) through a direct final rulemaking.

DATES: This rule is effective on **[Insert date 60 days from date of publication in the Federal Register]** without further notice, unless EPA receives relevant adverse comment by **[Insert date 30 days from date of publication in the Federal Register]**. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R06-OAR-2014-0191, by one of the following methods:

- www.regulations.gov. Follow the on-line instructions.
- E-mail: Ms. Adina Wiley at wiley.adina@epa.gov. Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- Mail or delivery: Ms. Adina Wiley, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

Instructions: Direct your comments to Docket ID No. EPA-R06-OAR-2014-0191. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business

Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through <http://www.regulations.gov> or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The <http://www.regulations.gov> website is an “anonymous access” system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment with the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214-665-7253.

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SUPPLEMENTARY INFORMATION: Throughout this document “we,” “our,” and “us” refers to EPA.

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I. Overview of State Submittals

EPA is approving through direct final action revisions to the Texas Minor NSR Program, related to the Texas SP Program, which were submitted on January 3, 2000; February 1, 2006; and March 11, 2011, and are summarized below. The effect of this direct final action will be to approve into the Texas Minor NSR SIP the provisions for the adoption and development of the Rule SP, the specific Rule SP for PCP, and a provision allowing for the use of the Rule SP for PCP for grandfathered and electing electric generating facilities. The approval of the provisions for the adoption and development of Rule SP brings this category of SP under the umbrella

provisions of the Texas Minor NSR SIP SP Program, ensuring that Rule SP meet all the requirements of the Act for Minor NSR permits. As discussed more fully in Sections I.B and II.B of this notice, we recognize that the TCEQ has recently promulgated a Non-Rule SP for PCP to replace the Rule SP for PCP. Despite the replacement of the Rule SP for PCP with the Non-Rule SP for PCP, the TCEQ has not withdrawn the Rule SP for PCP from our consideration. Therefore, we are acting on it today. Additionally, our action today is responsive to the March 26, 2012, Fifth Circuit Court of Appeals decision to vacate and remand our September 15, 2010 disapproval of the Rule SP for PCP, as amended by the Court's order of February 21, 2014, directing EPA to take final action on this submittal by May 19, 2014.^{1, 2}

A. 30 TAC Section 116.601(a)(1): Types of Standard Permits

Under state law, the Texas Standard Permits (SP) Program at 30 TAC Chapter 116, Subchapter F, is a component of the Texas Minor NSR Program. A SP under the Texas Minor NSR Program is not a case-by-case Minor NSR permit, but rather is a streamlined mechanism with all permitting requirements for construction and operation of a certain source category. Within the Texas SP Program, the TCEQ has the ability to develop and implement two types of Standard Permits – Rule Standard Permits (Rule SP) and Non-Rule Standard Permits (Non-Rule SP). These two categories of SP are identified at 30 TAC Section 116.601(a). The Non-Rule SP and the general provisions applicable to all SP are already approved as part of the Texas Minor NSR SIP. We are approving into the Texas Minor NSR SIP portions of two revisions to the Texas SIP submitted on January 3, 2000, and March 11, 2011, pertaining to the Rule SP. Specifically, we are approving 30 TAC Section 116.601(a)(1) as initially adopted on December

¹ *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917 at 922 (5th Cir. 2012) (hereinafter *Luminant*).

² Order on Motion to Amend and Enforce Judgment, *Luminant Generation Co. v. EPA*, No. 10-60891 (Fifth Cir. Feb. 21, 2014), amending *Luminant*.

16, 1999, and submitted as a revision to the Texas SIP on January 3, 2000, which addresses the development of Rule SP. Additionally, we are approving a non-substantive revision to 30 TAC Section 116.601(a)(1) adopted on February 9, 2011, and submitted as a revision to the Texas SIP on March 11, 2011. EPA has taken no action to date on the development of Rule SP at 30 TAC Section 116.601(a)(1).³ Therefore, our action approves the initial adoption and submittal on January 3, 2000, and the revisions submitted on March 11, 2011, addressing the development and implementation of Rule SP. Further, our action today approves the general provisions at 30 TAC Sections 601, 604, 605, 606, 610, 611, 614 and 615 pertaining to all SP as applicable to the Rule SP as well as the Non-Rule SP. With today's action, the category of Rule SP will now become part of the Texas Minor NSR SIP.

B. *30 TAC Section 116.617: State Pollution Control Project Standard Permit*

The Texas State Pollution Control Project Standard Permit (referred to as the SP for PCP) before us for SIP action is a Rule SP that must meet the requirements of 30 TAC Section 116.601(a)(1), which we are also approving today as described above. The Rule SP for PCP at 30 TAC Section 116.617 is a component of Texas's broader SP Program, which originated in 1994.

The Rule SP for PCP authorizes projects undertaken voluntarily, or as required by any federal or state statute or rule, that reduce or maintain currently authorized air emission rates for facilities authorized by a NSR permit, Standard Permit, or Permits by Rule, and that may have associated Minor NSR collateral emission increases in other regulated pollutants.^{4,5} On April 22,

³ EPA approved the provision at 30 TAC Section 116.601(a)(2) regarding the development of Non-Rule SP in a separate rulemaking. See 68 FR 64543, November 14, 2003.

⁴ See 30 TAC Section 116.617(a)(1) describing the scope and applicability of the Rule SP for PCP as adopted on January 27, 2006 by the State of Texas and submitted as a revision to the Texas SIP on February 1, 2006. See also

1994, Texas adopted a regulation at 30 TAC Section 116.617 that was a Rule SP applicable to pollution control projects for any regulated pollutant. On January 27, 2006, Texas repealed the previously submitted Rule SP for PCP and adopted a new Rule SP for PCP that is limited to Minor NSR only. Texas adopted the new Rule SP for PCP to be consistent with federal law after the D.C. Circuit limited the use of pollution control projects to Minor NSR. *New York v. EPA*, 413 F.3d 3, 40–42 (D.C. Cir. 2005). On February 1, 2006, Texas submitted the newly adopted Rule SP for PCP found at 30 TAC Section 116.617, among other provisions, to the EPA for approval into the Texas SIP.⁶ On September 23, 2009, EPA proposed to disapprove revisions to the Texas SIP, including the Rule SP for PCP at 30 TAC Section 116.617, on the basis that the Rule SP for PCP did not meet the requirements for a Minor NSR SIP revision. 74 FR 48467, 48471. EPA finalized our disapproval of the Rule SP for PCP on September 15, 2010. See 75 FR 56424.

Upon finalization of our disapproval, several parties (Luminant Generation Company, L.L.C.; Oak Grove Management Company, L.L.C.; Big Brown Power Company, L.L.C.; Luminant Mining Company, L.L.C.; Sandow Power Company, L.L.C.; Texas Association of Business; Texas Association of Manufacturers; Texas Oil & Gas Association; Chamber of Commerce of the United States of America; and the State of Texas) appealed our disapproval to the Fifth Circuit Court of Appeals.

the TCEQ Response to Comments provided in the preamble to the rule adoption at 31 TexReg 529, January 27, 2006.

⁵ See *Luminant*, 675 F.3d at 922 n. 3 (“although the projects by definition reduce or maintain emissions of the primary pollutant, they have the potential to cause incidental increases in the emissions of other regulated pollutants.”)

⁶ The February 1, 2006, SIP submittal also included amendments to 30 TAC Sections 116.610(a) and 116.610(b). EPA disapproved 30 TAC Sections 116.610(a) and (b) in our September 15, 2010 disapproval of the Rule SP for PCP. See 75 FR 56424. EPA consented to vacatur of our disapproval of 30 TAC Sections 116.610(a) and (b), and on March 26, 2012, the Fifth Circuit Court of Appeals vacated our disapproval of those two provisions. In response to the Court’s vacatur and remand, EPA separately finalized approval of 30 TAC Sections 116.610(a) and (b) on February 14, 2014. See 79 FR 8861.

Prior to a ruling by the Fifth Circuit Court of Appeals, the TCEQ conducted rulemaking to revise the Rule SP for PCP at 30 TAC Section 116.617 and issued pursuant to the Texas Minor NSR SIP, a new Non-Rule SP for PCP to replace the Rule SP for PCP at 30 TAC Section 116.617. On February 9, 2011, TCEQ adopted, without submitting for SIP approval, revisions to the Rule SP for PCP at 30 TAC Section 116.617. Those new non-SIP provisions are codified at 30 TAC Section 116.617(a)(4) and (a)(5), and provide that “no new or modified registrations will be accepted and no existing registrations will be renewed” under the Rule SP for PCP “on or after March 3, 2011.” See 36 TexReg 1323, February 25, 2011. Additionally, the Non-Rule SP for PCP issued on February 9, 2011, that became part of the Texas Minor NSR SIP immediately upon its effective date of March 3, 2011, requires at sections (1)(D)(i) – (iii) that all Rule SP for PCP authorized as of March 3, 2011, must be converted to a Non-Rule SP for PCP no later than the ten-year renewal anniversary of the authorization.⁷ Therefore, from March 3, 2011, forward, under the Texas SIP, no source can register for a new Rule SP for PCP at 30 TAC Section 116.617, and registrants for the existing Rule SP for PCP must use for revision and renewal purposes, the Non-Rule SP for PCP which the TCEQ developed pursuant to the Texas SIP at 30 TAC Sections 116.601(a)(2) and 116.603. 36 TexReg 2305, February 25, 2011. Because a SP must be renewed every 10 years pursuant to the SIP-approved provisions at 30 TAC Section 116.604, all PCPs currently authorized under a Rule SP for PCP are required by the Texas Minor NSR SIP to be renewed and comply with the Non-Rule SP for PCP no later than March 3, 2021. Effectively, the SIP Non-Rule SP for PCP creates a sunset date beyond which the Rule SP for PCP will be unavailable.

⁷ The State’s summary document explains that “This new non-rule standard permit replaces the existing 30 TAC § 116.617 for authorization of new pollution control projects (PCP).” Air Quality Standard Permit For Pollution Control Projects Summary Document, Section II – Explanation and Background of Air Quality Standard Permit (March 10, 2011), available at <http://www.tceq.state.tx.us/permitting/air/announcements/nsr-announce-3-10-11.html>.

On March 26, 2012, the Fifth Circuit Court of Appeals granted the petition for review, vacated our disapproval of the Rule SP for PCP, and remanded the matter back to EPA for further review. *Luminant*, 675 F.3d 917. The ruling did not address the changes Texas had made to the Rule SP for PCP but not submitted for SIP approval, including the date limitations Texas added to the Rule SP for PCP. Nor did the decision address the availability of the SIP-approved Non-Rule SP for PCP as a replacement for the Rule SP for PCP and the mechanism to obtain federal authorization for PCP in Texas.⁸ The effect of the ruling was to put back in front of EPA for review and consideration as a revision to the Texas SIP the Rule SP for PCP as submitted on February 1, 2006. The Fifth Circuit issued an Order on February 21, 2014, instructing EPA to issue a final rule regarding the Rule SP for PCP by May 19, 2014.

Our action today is confined to the approval of the Rule SP for PCP submitted on February 1, 2006, at 30 TAC Section 116.617, combined with the approval of the Rule SP as an available type of SP, as meeting the Minor NSR SIP requirements consistent with the Fifth Circuit decision regarding the Rule SP for PCP as a Minor NSR program.⁹ Today's action reflects EPA's evaluation of the Texas regulations and its conclusion that the Texas rules are consistent with the requirements of the CAA. EPA's approval of the Rule SP for PCP into the Texas SIP will not provide federal authorization for projects registered under the Rule SP for PCP before it was SIP-approved. CAA Section 110(i); 40 CFR 51.105; *see also*, *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60 (1975); *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028,

⁸ On remanding the case to EPA, the court noted as follows "It is difficult to conceive, and the EPA has not suggested, how it could disapprove the PCP Standard Permit under the appropriate statutory factors ... when pressed at oral argument, the EPA was unable to identify any legal deficiencies with the PCP Standard Permit other than its supposed failure to meet ... requirements that today we hold unlawful – despite the half decade the EPA has had to evaluate it. Nevertheless, we defer to the Agency to evaluate Texas's regulations in light of the proper CAA standards." *Id.* At 932 n. 12.

⁹ The Fifth Circuit has recognized that the Rule SP for PCP "applies only to minor NSR." 675 F.3d at 922.

1034 (7th Cir. 1984); *United States v. Ford Motor Co.*, 814 F.2d 1099, 1102-03 (6th Cir. 1987); *Sierra Club v. TVA*, 430 F.3d 1337, 1347 (11th Cir. 2005).¹⁰

C. 30 TAC Section 116.911(a)(2): Control Method for Grandfathered and Electing Electric Generating Facilities

We are approving a portion of revisions to the Texas SIP submitted on January 3, 2000, regarding the application and permitting procedures for grandfathered and electing electric generating facilities (EGFs). Specifically, we are approving 30 TAC Section 116.911(a)(2) – Control method. Background information about the permitting of grandfathered and electing EGFs in Texas subject to Texas Senate Bill 7 (SB 7) is available in EPA’s partial approval and partial disapproval of the Texas provisions for permitting grandfathered and electing EGFs on January 11, 2011. See 76 FR 1525.

As explained more fully in EPA’s January 11, 2011 notice, EPA partially approved and partially disapproved the Texas provisions for permitting grandfathered and electing EGFs, referred to as the Texas SB 7 permitting program. 76 FR 1525. Specifically, EPA partially disapproved the provisions for control methods for grandfathered electric generating units at 30 TAC Section 116.911(a)(2) because they provided that a source could obtain coverage under the Rule SP for PCP at 30 TAC Section 116.617, which we had disapproved on September 15, 2010. Upon finalization of our partial approval and partial disapproval, several parties (Luminant Generation Company, L.L.C.; Big Brown Power Company, L.L.C.; and the State of Texas) filed a petition for review of EPA action to the Fifth Circuit Court of Appeals. On September 12,

¹⁰ We state this to clarify any potential confusion created by statements made in the Fifth Circuit February 21, 2014 Order on Motion to Amend and Enforce Judgment that seem to imply that authorizations under the Rule SP for PCP obtained prior to EPA’s SIP approval “may in fact be valid under the Clean Air Act” upon approval by EPA. *Luminant et al. v. EPA*, Order on Motion to Amend and Enforce Judgement, Case No. 10-60891, at 9 (5th Cir. Feb. 21, 2014).

2012, EPA requested the Fifth Circuit vacate our disapproval and remand the provision back to EPA for further proceedings. On October 4, 2012, the Fifth Circuit granted our request by vacating our disapproval of 30 TAC Section 116.911(a)(2) and remanded the matter back to EPA.

Our approval today of 30 TAC Section 116.601(a)(1), into the Texas SIP, results in the application of the SIP's general provisions for SP applying now to Rule SP as well as Non-Rule SP. Additionally, our evaluation today is that the specific Rule SP for PCP at 30 TAC Section 116.617, as submitted on February 1, 2006, when combined with the general provisions for SP, satisfies the requirements for Minor NSR and our prior basis for disapproval of 30 TAC Section 116.911(a)(2) is no longer supportable. Accordingly, today's direct final action approving 30 TAC Sections 116.601(a)(1) and 116.617 as part of the Texas Minor NSR SIP also approves 30 TAC Section 116.911(a)(2) as part of the Texas SB7 permitting program and the Minor NSR SIP consistent with the Fifth Circuit remand and vacatur of the Rule SP for PCP.

The following table identifies the sections addressed in today's direct final action.¹¹

Table 1: Summary of the Individual Revisions to Each Section Evaluated				
Section	Title	Date Submitted to EPA	Adopted by State	Comments
Chapter 116				
Subchapter F				
30 TAC Section 116.601	Types of Standard Permits	January 3, 2000	December 16, 1999	New provision at 30 TAC Section 116.601(a)(1) establishes the Rule SP as one of two types of SP available in the Texas Minor NSR Program.
		March 11, 2011	February 9, 2011	Revisions to 30 TAC Section

¹¹ Note that the TCEQ also submitted other, non-related revisions to the Texas SIP in the rulemakings identified in the Table. The accompanying Technical Support Document (TSD) for this direct final action identifies each submitted provision and the date of EPA's action on the provision. The TSD is available in the rulemaking docket.

				116.601(a)(1) to remove cross-references from the definition of the Rule SP.
30 TAC Section 116.617	State Pollution Control Project Standard Permit	February 1, 2006	January 11, 2006	Repeal and replacement of the Rule SP for PCP at 30 TAC Section 116.617.
Subchapter I				
30 TAC Section 116.911(a)(2)	Control method	January 3, 2000	December 16, 1999	Requires the use of the Rule SP for PCP at 30 TAC 116.617.

II. Evaluation of State Submittals

A. 30 TAC Section 116.601(a)(1): Types of Standard Permits

EPA approved Texas' regulations for Non-Rule SP in 30 TAC Chapter 116, Subchapter F on November 14, 2003 (68 FR 64543) as meeting the federal requirements for Minor NSR.¹² When the Texas Minor NSR SP Program began in 1994, all SPs were developed using the State's rulemaking process under the Texas Government Code, Chapter 2001, Subchapter B. To streamline the process for development and issuance of SPs within the Texas Minor NSR Program, Texas Senate Bill 766 of the 76th Legislature directed the Texas Natural Resource Conservation Commission to develop an alternate process whereby the SPs could be developed and implemented without going through the formal rule-making process.¹³ On January 3, 2000, the TCEQ submitted a SIP revision that created the two types of SP that exist today in the Texas Minor NSR Program – the Rule SP and the Non-Rule SP. Specifically, this revision to the Texas SIP included:

¹² EPA did not approve the Rule SP at 30 TAC Section 116.601(a)(1) or the specific Rule SP for PCP at 30 TAC Section 116.617, the Rule SP for Oil and Gas Facilities at 30 TAC 116.620, or the Rule SP for Municipal Solid Waste Landfills at 30 TAC Section 116.621 in the November 14, 2003 action. See 68 FR 64543, at 64547. Since that time, EPA has approved the Rule SP for Oil and Gas Facilities at 30 TAC Section 116.620 on February 14, 2014 at 79 FR 8861. The TCEQ repealed the Rule SP for Municipal Solid Waste Landfills at 30 TAC Section 116.621 on March 1, 2006.

¹³ The Texas Natural Resource Conservation Commission is the predecessor agency to the TCEQ, hereafter referred to as the TCEQ.

- New 30 TAC Section 116.601(a)(1) which identified those SP that were adopted through rulemaking in accordance with Texas Government Code, Chapter 2001, Subchapter B. (Rule Standard Permits or Rule SP).
- New 30 TAC Section 116.601(a)(2) which identified those SP that were issued after a public notice and comment period in accordance with 30 TAC Section 116.603 (relating to the Public Participation in Issuance of Standard Permits) (Non-Rule Standard Permits or Non-Rule SP) rather than through rulemaking.¹⁴

Since the initial adoption of 30 TAC Section 116.601(a)(1), the TCEQ has adopted one revision to the identification of Rule SPs and submitted this amendment to the Texas SIP on March 11, 2011. This non-substantive revision removes unnecessary cross-references in the Rule SP regulation in the Texas SP program for the Rule SP for PCP and the Rule SP for Oil and Gas Facilities. This non-substantive revision also removes the cross-reference to the repealed Rule SP for Municipal Solid Waste Landfills. Our direct final approval addresses the initial adoption of 30 TAC 116.601(a)(1), as revised through the March 11, 2011, SIP submittal.

EPA finds that the 30 TAC Section 116.601(a)(1) as revised through the March 11, 2011, SIP submittal is an integral part of the Texas Minor NSR program and approves it as part of the Texas Minor NSR SIP. This provision enables the Texas SIP to meet the requirements of 40 CFR 51.160 by clearly identifying the scope of the Texas SP Program and identifying the legally enforceable procedures the TCEQ will use in developing Rule SPs. As previously noted, our approval also means that the general provisions at 30 TAC Sections 601, 604, 605, 606, 610,

¹⁴ On November 14, 2003, EPA fully approved the Non-Rule Standard Permit provisions, including the identification of the Non-Rule Standard Permits at 30 TAC Sections 116.601(a)(2). See 68 FR 64543. Thereafter, upon TCEQ issuance of a Non-Rule SP, the specific Non-Rule SP automatically becomes part of the Texas Minor NSR SIP.

611, 614, and 615 approved into the Texas Minor NSR SIP in our November 14, 2003 action, now apply to the Rule SP in addition to Non-Rule SP. Additionally, 30 TAC Section 116.601(a)(1) satisfies the Minor NSR public notice requirements at 40 CFR 51.161 by specifying that a Rule SP is developed in accordance with Texas Government Code, Chapter 2001, Subchapter B. This is the rulemaking process that TCEQ uses in developing any revision to the Texas SIP; under this Code, when developing a Rule SP the TCEQ is required to publish notice of the proposed Rule SP in the Texas Register. TCEQ is also required to provide for 30 days notice on the proposed Rule SP.¹⁵

B. *30 TAC Section 116.617: State Pollution Control Project Standard Permit*

Federal regulations at 40 CFR 51.160 require a Minor NSR program to include legally enforceable procedures that enable the permitting authority to ensure that no construction of a facility or modification will cause a violation of applicable portions of the control strategy or interfere with attainment or maintenance of a NAAQS. The Rule SP for PCP at 30 TAC Section 116.617 submitted on February 1, 2006, is a component of the Texas Minor NSR program. 30 TAC Section 116.610(b) limits the Texas SP Program to Minor NSR and provides that a SP cannot be used to authorize a project that constitutes a new major stationary source or major modification. Therefore, the Rule SP for PCP can be used at minor sources, or at major sources taking a Minor NSR action. But in all cases, the Rule SP for PCP will not authorize emission increases that would have triggered Major NSR review under either the SIP-approved Texas Prevention of Significant Deterioration or Nonattainment NSR programs. As discussed above and in Section I.B. and as recognized by the Fifth Circuit, *Luminant*, 675 F.3d at 922, the

¹⁵ As discussed previously, a SP is not a case-by-case permit. Therefore, the Rule SP goes through public comment during the development process, but does not have separate notice and comment requirements for each authorization of the Rule SP.

applicability of the Rule SP for PCP is clearly limited to Minor NSR and EPA finds that the provisions at 30 TAC Section 116.617, in conjunction with the already-SIP approved general provisions for SP, satisfy the federal requirements for a Minor NSR program.

The Rule SP for PCP that we are acting on now is a Rule SP as identified in 30 TAC Section 116.601(a)(1). The TCEQ used the public notice procedures found in Texas Government Code, Chapter 2001, Subchapter B to develop and accept comments on the program.

Consequently, the development of the Rule SP for PCP provided public notice that satisfies the requirements for Minor NSR public notice at 40 CFR 51.161. Furthermore, because we are approving into the Texas Minor NSR SIP, 30 TAC Section 116.601(a)(1), all of the SP general requirements previously approved into the Texas SIP in 2003 as applicable for the Non-Rule SP now apply to the Rule SP for PCP. The registrant is required at 30 TAC Section 116.615(1) to protect public health and welfare. Additionally, sources seeking authorization via the Rule SP for PCP are required to submit a SP registration to TCEQ under 30 TAC Section 116.611, which must include information regarding the proposed project to be authorized (e.g., emission estimates, description of project and related process, description of equipment being installed). 30 TAC Section 116.615 includes general conditions that must be met by sources authorized by a Rule SP, including the Rule SP for PCP; these general conditions specifically require that the sources authorized under a SP comply with “all rules, regulations, and orders of the commission issued in conformity with the [Texas Clean Air Act].” See 30 TAC Section 116.615(10). In the case where more than one state or federal rule, regulation, or permit condition is applicable, the source must comply with the most stringent requirement or limit. See 30 TAC Section 116.615(10). Therefore, the conditions of the Rule SP for PCP in no way supersede or relax other applicable state or federal requirements. In addition, 30 TAC Sections 116.610(a), 116.615,

and 116.617(b) require that sources authorized under the Rule SP for PCP submit appropriate documentation to demonstrate compliance with state and federal provisions, including New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants. Regarding testing, recordkeeping, reporting and monitoring provisions, 30 TAC Section 116.615 requires recordkeeping and monitoring sufficient to demonstrate compliance with the Rule SP for PCP and all other requirements for SP. This means the sources authorized under a Rule SP for PCP must maintain records/testing/monitoring/etc sufficient to demonstrate status as Minor NSR and compliance with all federal and state provisions, as discussed above. The Rule SP for PCP only authorizes collateral emission increases of regulated pollutants from permitted projects that otherwise “reduce or maintain currently authorized emission rates.” Additionally, 30 TAC Section 116.617(a)(3)(B) provides that the Rule SP for PCP cannot be used to authorize the installation of emission control equipment or the implementation of a control technique that the TCEQ Executive Director has determined has the potential to exceed a NAAQS until the potential exceedances are addressed. Based on all of these provisions, EPA concludes that the Rule SP for PCP contains legally enforceable procedures to prevent interference with a NAAQS.

As previously discussed, EPA disapproved the Rule SP for PCP on September 15, 2010. Prior to the ruling by the Fifth Circuit Court of Appeals, the TCEQ conducted rulemaking to revise the Rule SP for PCP at 30 TAC Section 116.617 and to also issue a new Non-Rule SP for PCP that automatically became part of the Texas Minor NSR SIP upon its effective date, to replace the Rule SP for PCP at 30 TAC Section 116.617. Therefore, from March 3, 2011, forward, pursuant to the Texas SIP, sources seeking authorization for a PCP must register under the Non-Rule SP for PCP and all renewals and revisions to currently authorized Rule SP for PCP must be done under the Non-Rule SP for PCP. The Non-Rule SP for PCP became effective on

March 3, 2011, and was developed by TCEQ according to the requirements of 30 TAC Sections 116.601(a)(2) and 116.603. 36 TexReg 2305, February 25, 2011. Because the method for issuing the Non-Rule SP for PCP was approved by EPA into the Texas SIP in 2003, the Non-Rule SP for PCP issued by TCEQ is now part of the Texas Minor NSR SIP.

The TCEQ has not submitted the revisions to 30 TAC Section 116.617, the Rule SP for PCP, adopted on February 9, 2011, as revisions to the Texas SIP. Therefore, EPA is only approving as a revision to the Texas Minor NSR SIP the Rule SP for PCP at 30 TAC Section 116.617 as initially adopted and submitted February 1, 2006. The February 9, 2011, revisions to 30 TAC Section 116.617(a)(4) and (a)(5) establishing date and other limitations are not federally enforceable as SIP requirements. However, as previously noted, the issuance of the Non-Rule SP for PCP created the SIP-approved mechanism for obtaining initial, revised and renewal authorizations for PCP.

C. *30 TAC Section 116.911(a)(2): Control Method for Grandfathered and Electing Electric Generating Facilities*

EPA previously disapproved 30 TAC Section 116.911(a)(2) because it allowed a source to obtain authorization through 30 TAC Section 116.617. However, we requested the Court to vacate that disapproval and remand to EPA for further consideration based on the Fifth Circuit ruling on EPA's disapproval of 30 TAC Section 116.617. As discussed previously in Section II.B of this direct final action, EPA now approves it as a SIP revision, based on today's finding that 30 TAC Section 116.617 is an approvable component of the Texas Minor NSR program. By extension, the provision in 30 TAC Section 116.911(a)(1) allowing sources to obtain

authorization through 30 TAC Section 116.617 is also an approvable provision of the Texas Minor NSR program, and therefore approvable as submitted on January 3, 2000.

D. CAA Section 110(l) Analysis

Under Section 110(l) of the CAA, the regulations submitted as a SIP revision adopting and implementing the Texas SP Program, and specifically the Rule SP for PCP, must meet the procedural requirements of Section 110(l) by demonstrating that the State followed all necessary procedural requirements such as providing reasonable notice and public hearing of the SIP revision. Additionally, the SIP revision must demonstrate that the adopted rules will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA. We find that the TCEQ satisfied all requirements pursuant to Section 110(l).

The regulation of minor sources is a requirement of Section 110(a)(2)(C) of the CAA and EPA's regulations at 40 CFR 51.160 – 51.164. As discussed in this direct final action and the accompanying TSD, EPA finds that the revisions to the Texas SP Program establishing the type of SP termed the Rule SP submitted on January 3, 2000 and revised on March 11, 2011; the Rule SP for PCP submitted on February 1, 2006; and the provision allowing for the use of the Rule SP for PCP as a control method for Texas SB7 grandfathered and electing EGFs as submitted on January 3, 2000; satisfy the requirements for Minor NSR. The Rule SP for PCP when combined with the already SIP-approved general provisions that apply to all SP, includes adequate provisions to provide legally enforceable procedures to ensure protection of the control strategy and any applicable NAAQS. The Texas Minor NSR SIP SP general provisions, and specifically the Rule SP for PCP, also contain sufficient safeguards to prevent circumvention of Major NSR

permitting requirements. The Rule SP for PCP only authorizes collateral emission increases of regulated pollutants from permitted projects that would otherwise “reduce or maintain currently authorized emissions rates.” Additionally, 30 TAC Section 116.617(a)(3)(B) provides that the Rule SP for PCP cannot be used to authorize the installation of emission control equipment or the implementation of a control technique that the TCEQ Executive Director has determined has the potential to exceed a NAAQS until the potential exceedances are addressed. In sum, we find that the revisions to the Texas SIP adopting and implementing revisions to the Texas Minor NSR Program for Standard Permits, specifically provisions for the development of Rule SP and establishment and use of the Rule SP for PCP, satisfy the requirements of Section 110(l) of the Act.

III. Final Action

EPA has made the determination that the revisions to the Texas SIP submitted on January 3, 2000, February 1, 2006, and March 11, 2011, which are part of this direct final rulemaking, are approvable because they were adopted and submitted in accordance with the CAA and EPA regulations regarding Minor NSR. Therefore, under section 110 of the Act, and for the reasons stated above, EPA is taking direct final action to approve the following revisions to the Texas SIP:

- The initial submittal of 30 TAC Section 116.601(a)(1) as a revision to the Texas SIP on January 3, 2000, and the subsequent amendments to 30 TAC Section 116.601(a)(1) submitted on March 11, 2011.
- The repeal and replacement of 30 TAC Section 116.617 submitted as a revision to the Texas SIP on February 1, 2006.

- The adoption of 30 TAC Section 116.911(a)(2) submitted as a revision to the Texas SIP on January 3, 2000.

EPA is publishing this rule without prior proposal because we view this as a non-controversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This rule will be effective on **[FEDERAL REGISTER OFFICE: insert date 60 days from date of publication in the Federal Register]** without further notice unless we receive adverse comment by **[FEDERAL REGISTER OFFICE: insert date 30 days from date of publication in the Federal Register]**. If we receive adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. In that case, we will address all public comments on today's notice in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided

that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the

effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon Monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 21, 2014

Ron Curry,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS – Texas

2. In § 52.2270 (c), the table titled “EPA APPROVED REGULATIONS IN THE TEXAS SIP” is amended by:

- a. Revising the entries for Sections 116.601 and 116.911.
- b. Adding a new entry for Section 116.617 immediately after the entry for Section 116.615.

The amendments read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State Citation	Title/subject	State approval/ submittal date	EPA approval date	Explanation
* * * * *				
Subchapter F – Standard Permits				
Section 116.601	Types of Standard Permits	2/9/2011	[Insert date of <u>FR</u> publication] [Insert <u>FR</u> page number where document begins]	
* * * * *				

Section 116.617	State Pollution Control Project Standard Permit	1/11/2006	[Insert date of <u>FR</u> publication] [Insert <u>FR</u> page number where document begins]	
* * * * *				
Subchapter I – Electric Generating Facility Permits				
* * * * *				
Section 116.911	Electric Generating Facility Permit	5/22/2002	[Insert date of <u>FR</u> publication] [Insert <u>FR</u> page number where document begins]	Section 116.911(a)(2) is authorized for Minor NSR only.
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